SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM

NANCY CORINNE DYER and J. RAYMOND DYER
Petitioners

PUBLIC SERVICE COMMISSION OF MISSOURI
and
UNION ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

J. RAYMOND DYER
[illegible]
[illegible]
Attorney for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI and
UNION ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

Petitioners pray that a writ of certiorari issue to review the electricity rate increase judgment of the Supreme Court of Missouri entered December 12, 1960 in the above entitled cause sub nom. **State ex rel Nancy Corinne Dyer and J. Raymond Dyer, appellants, v Public Service Commission of Missouri, respondent, and Union Electric Company, intervener-respondent.**

CITATIONS TO OPINIONS BELOW.

The July 16, 1959 Report and Order of the Public Service Commission of Missouri ("PSC") is reported in **Matter of Union Electric Co., 29 PUR 3d 254**, and is set

forth in Appendix C-1. It was affirmed, without opinion, by the Circuit Court of Cole County, Missouri, on January 18, 1960. See Appendix C-3. That judgment was affirmed by the Missouri Supreme Court on December 12, 1960. That court's opinion is reported in **341 SW 2d 795** and is set forth in Appendix D-1.

JURISDICTION.

The judgment of the Missouri Supreme Court, the highest court in the State of Missouri, was final as to all parties and issues. Petitioners' motion for rehearing and to transfer to the court en banc was filed December 24, 1960, within time. That motion was overruled on January 9, 1961, on which date the court, on its own motion, modified its opinion. Jurisdiction is invoked under **28 USC 1257 (3)**.

WHEN AND HOW THE FEDERAL QUESTION WAS PRESENTED BELOW.

Appendix B specifies the stages in these proceedings, the manner in which, and the methods petitioner used to raise below the federal question presented for review herein. To summarize, the federal question was first presented by petitioners to the PSC at the outset of its adversary proceedings, in petitioners' Statement of Interest and Position, p. 2, filed March 2, 1958. Petitioners presented it thrice again, in their brief to the PSC, pgs. 4, 9 and 18, filed May 28, 1959, which brief is part of the record herein. They presented it again in their June 17, 1959 reply brief to the PSC, p. 3, which brief is part of the record herein. They presented it thrice again in their timely motion to the PSC for rehearing, pgs. 3 and 6, filed August 3, 1959. They presented it on October 30, 1959, in oral argument in the review proceedings before the Circuit Court of Cole County, Missouri. On April

23, 1960 they presented it in their motion to the Supreme Court of Missouri to hear this cause en banc, p. 3, and four times again to that court in their August 5, 1960 brief, pgs. 36, 38, 61 and 65. That brief is part of the record herein. At the September 26, 1960 oral argument before the Missouri Supreme Court petitioners presented the federal question again. In their timely December 24, 1960 motion to the Missouri Supreme Court for rehearing en banc petitioners presented the federal question thrice again, in their Points I, III and IV, p. 1. In their Suggestions in Support of that motion (which Suggestions are part of the record herein) petitioners presented the federal question four more times, on pgs. 4, 7, and 9. In all they presented it 22 times. Each time petitioners' contention that a federal question was involved was either ignored or tacitly overruled.

THE FEDERAL QUESTION.

The federal question presented here is whether the rate base of Union Electric Company ("Union"), a registered public utility holding company under the Public Utility Holding Company Act of 1935, can lawfully be determined by the PSC, for the purpose of fixing Union's Missouri electricity rates, on the basis of the federally repudiated "fair value" rule of **Smyth v. Ames (1898), 169 US 466, 546**, and **State ex rel Missouri Water Co. v PSC (Mo. 1957), 308 SW 2d 704, 719**, in view of the provisions of **Sec. 393.270(4), R.S.Mo. 1949, V.A.M.S.**, and the rejection of that "fair value" rule contained in Judge Learned Hand's District Court decision in **Consolidated Gas Co. v Newton (SD NY 1920) 267 F 231. PUR 1920 F 483, aff'd (1922) 258 US 165**, and in his law review article published in **24 Mich. L. R. 466, 473**, and in view of the substitution by this court of its "end result" rule, announced in **FPC v Hope Natural Gas Co. (1944) 320 US 591**, for that repudiated hodgepodge "fair value" rule.

STATUTES INVOLVED.

Sec. 1 (a) of the Public Utility Holding Company Act of 1935, **15 USC 79a, and Secs. 393.270(4) and 393.130(3), R.S.Mo. 1949, V.A.M.S.** They are set forth, in pertinent part, in Appendix A.

STATEMENT.

On September 26, 1958 Union filed with the PSC a Schedule of Rates under which it sought an increase in the prices it might charge its intrastate retail Missouri consumers for electricity as distinguished from its interstate wholesale Missouri consumers, the rates for whom are fixed by the Federal Power Commission under federal law. See PSC Tr. Vol. I, 35, Vol. III, 468, Vol. XI, 1366 and Union's Ex. B-25. In the proceedings that followed evidence of the original cost of Union's Missouri properties, and their reproduction (trended) cost as of the close of the test year, was introduced. The purpose was to ascertain the rate base.

Sec. 393.270(4), R.S.Mo. 1949, V.A.M.S. (Appendix A-2) required the PSC to take the "capital actually expended" by Union in acquiring its Missouri properties into consideration in determining the "price to be charged for . . . electricity". **State ex rel Missouri Water Co. v. PSC (Mo. 1957), 308 SW 2d 704,** which followed the federally repudiated "fair value" rule of **Smyth v Ames (1898), 169 US 466, 546,** required the PSC to take reproduction cost into consideration as well. One of the PSC commissioners inquired of petitioners, who were contending against application of the "fair value" rule:

> "Aren't we bound by what the (Missouri) Supreme Court, across the street, said . . .?" (PSC Tr. Vol. VIII, 1237).

The PSC felt itself so bound. It determined from the evidence that the adjusted depreciated original cost of Union's Missouri properties as of the end of the test year was $340,470,862, and that the adjusted depreciated reproduction (trended) cost of its Missouri properties as of the end of the test year was ~~$612,133,197~~ (Appendix C-1, p. 9). It considered both of those figures in its determination of the "fair value" of Union's Missouri properties, contrary to the federal rule as expressed by Judge Learned Hand in **Consolidated Gas Co. v Newton (SD NY 1920), 267 F 231, PUR 1920 F 483, aff'd (1922) 258 US 165,** and as expressed in his law review article, **24 Mich. L. R. 466, 473.**

The PSC's apportionment of "values" came about as follows: During the PSC proceedings one of the Commissioners asked Mr. John H. Bickley, one of Union's expert witnesses, what "fair value" was. Mr. Bickley replied (PSC Tr. Vol. VI, 963) that "fair value is a judgment figure". That Commissioner then said (PSC Tr. Vol. VI, 954):

> "Boiling it down simpler, isn't the question involved in all these rate cases: How much money does the company need? How many dollars does the company need?"

Mr. Bickley replied (Id.) that "It is necessary to have some sound approach to the problem. No one is in a position to say this company ought to have $20 million or $30 million unless he has a rational approach".

Then another Commissioner asked Mr. Bickley (Id., 961) if he had "arrived at any fixed principle that commissions could use in figuring out from original cost and reproduction cost what is the fair value?". Mr. Bickley replied (Id.):

> "I would give about 75% weight to original cost and 25% weight to reproduction cost".